

STATE OF MICHIGAN
COURT OF APPEALS

TONYA R. COLEMAN,

Plaintiff-Appellee,

v

HDS SERVICES/TRETTCO INCORPORATED
and TRAVELERS PROPERTY CASUALTY
COMPANY OF AMERICA,

Defendants-Appellants.

UNPUBLISHED

April 19, 2012

No. 298468

WCAC

LC No. 06-000133

Before: FORT HOOD, P.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM.

Defendants appeal an order of the Workers' Compensation Appellate Commission (WCAC) affirming after second remand a magistrate's award of benefits in plaintiff's favor. This Court originally denied defendants' application for leave to appeal, but our Supreme Court, in lieu of granting leave to appeal, has remanded the case to us "for consideration as on leave granted." *Coleman v HDS Servs/Trettco, Inc*, 489 Mich 982; 799 NW2d 174 (2011). We affirm.

Plaintiff worked for defendant HDS Services as a hostess/supervisor at an assisted living facility. On April 17, 2007, during a conflict with another employee, Chris Foley, she fell and was injured. The circumstances surrounding the fall were disputed. Ultimately, the magistrate found credible plaintiff's account that she fell backward over a cart as she was backing away from Foley, who put his body up against her body and touched her forehead with the tip of his index finger. The WCAC accepted that determination, and defendants do not seek to overturn those findings of fact.

Defendants' first argument concerns the misconduct provision of MCL 418.305, which states that "[i]f the employee is injured by reason of his intentional and wilful misconduct, he shall not receive compensation under the provisions of this act." The WCAC agreed with the magistrate that plaintiff was not injured "by reason of" any alleged misconduct by plaintiff. Defendants contend that the WCAC's analysis concerning this point is not legally sound.

Although the issue whether plaintiff's injury arose by reason of intentional and wilful misconduct as contemplated by MCL 418.305 is a question of fact, *Daniel v Dep't of Corrections*, 468 Mich 34, 40; 658 NW2d 144 (2003), defendants are claiming a legal error in the analysis. "The WCAC's decision may be reversed if it operated within the wrong legal framework or based its decision on erroneous legal reasoning." *Romero v Burt Moeke Hardwoods, Inc*, 280 Mich App 1, 5; 760 NW2d 586 (2008). Questions of law are reviewed de novo. *Oxley v Dep't of Military Affairs*, 460 Mich 536, 540-541; 597 NW2d 89 (1999).

Although there was evidence that plaintiff had been yelling and swearing before she was injured, the magistrate determined that such conduct was not causally related to plaintiff's injury. The magistrate explained:

Even if I were to find that yelling and swearing were intentional and wilful misconduct under the Act, I do not find that Plaintiff's injury occurred 'by reason of' her behavior, but rather that it occurred by virtue of Foley's actions in pressing against her. I find as fact that Foley's actions were not causally related to any intentional or wilful misconduct of Plaintiff, but rather that they were volitional on his part.

The WCAC stated:

The above analysis is legally sound and is supported by the magistrate's factual findings, which we have affirmed. The defendants failed to establish the plaintiff was 'injured by reason' of her misconduct. Accordingly, the § 305 defense fails.

We discern no legal error in the analysis of the WCAC, which in turn found no error in the magistrate's analysis. "'By reason of' is defined as '[b]y means, acts, or instrumentality of.'" *Daniel*, 468 Mich at 43, quoting Black's Law Dictionary (6th ed). We disagree with defendants that this case is factually comparable to *Daniel* and *Brackett v Focus Hope, Inc*, 482 Mich 269; 753 NW2d 207 (2008). In those cases, the employees claimed mental disability resulting from disciplinary action that stemmed from the employees' behavior. The causal connection between the discipline and the mental disability was not at issue. *Daniel*, 468 Mich at 43; *Brackett*, 482 Mich at 280. The connection between the misconduct and discipline was self-evident. In *Daniel*, the Court stated:

"[I]t cannot be disputed that [plaintiff's] misconduct was the starting point for the resultant disciplinary proceedings that ultimately caused his injury. Had plaintiff not engaged in sexual harassment, he would not have been subjected to the disciplinary proceedings, and he would not have been suspended from his job. . . . [T]he disciplinary proceedings, from which plaintiff's mental disability arose, flowed directly and predictably from plaintiff's misconduct as surely as night follows day." [*Daniel*, 468 Mich at 43-44, quoting with approval, *Daniel v Dep't of Corrections*, 248 Mich App 95, 115-116; 638 NW2d 175 (2001) (O'Connell, J., dissenting).]

The Court's recognition of a causal connection between the misconduct and discipline in *Daniel* and *Brackett* does not suggest that the failure to find a causal connection in this case was legal error. The magistrate determined, and the WCAC agreed, that plaintiff was injured because she fell backward over a cart as she backed away from Foley, who "put his body up against her body and touched her forehead with the tip of his index finger." Even if plaintiff yelled or swore earlier in the confrontation, that alleged conduct did not directly and predictably flow into her injuries from falling over a cart. The WCAC and the magistrate recognized and applied the correct legal standard for analyzing misconduct under *Daniel* and *Brackett*, but determined that the requisite causal connection was not factually present. There was no legal error in the analysis.

Defendants next argue that the WCAC committed legal error by misallocating the burden of proof in its analysis of disability under *Stokes v Chrysler LLC*, 481 Mich 266; 750 NW2d 129 (2008). Defendants contend that the WCAC improperly considered testimony by defendants' expert to determine that a prima facie case of disability was established.

In *Stokes*, the Supreme Court discussed the standard for establishing disability under MCL 418.301(4)¹ as follows:

First, the injured claimant must disclose his qualifications and training. . . .

Second, the claimant must then prove what jobs, if any, he is qualified and trained to perform within the same salary range as his maximum earning capacity at the time of the injury. . . .

* * *

Third, the claimant must show that his work-related injury prevents him from performing some or all of the jobs identified as within his qualifications and training that pay his maximum wages.

Fourth, if the claimant is capable of performing any of the jobs identified, the claimant must show that he cannot obtain any of these jobs. . . .

Upon the completion of these four steps, the claimant establishes a prima facie case of disability. The following steps represent how each of the parties may then challenge the evidence presented by the other.

¹ The *Stokes* standard was largely incorporated in recent amendments of the WDCA. See 2011 PA 266, which became effective December 19, 2011. The parties do not argue that the amendments are relevant to this appeal, which was filed after the effective dates of the amendments.

Fifth, once the claimant has made a prima facie case of disability, the burden of production shifts to the employer to come forward with evidence to refute the claimant's showing. . . .

Sixth, in satisfying its burden of production, the employer has a right to discovery . . . if discovery is necessary for the employer to sustain its burden and present a meaningful defense. . . .

Finally, the claimant, on whom the burden of persuasion always rests, may then come forward with additional evidence to challenge the employer's evidence. [*Stokes*, 481 Mich at 281-284 (citations omitted).]

The Court further explained:

This precise sequence is not rigid, but rather identifies the nature of the proofs that must precede the fact-finder's decision. Should it become evident in a particular case that a different sequence is more practical, the parties may present their evidence accordingly. However, the magistrate must ensure that all steps are completed in some fashion or another, that all the facts necessary to the determination of the case are presented, that each side has been accorded an adequate opportunity to respond to the other's proofs, and that the statutory burden of proof is respected. After that point, the magistrate can properly determine whether the claimant has satisfied his obligations under MCL 418.301(4).

We reiterate that MCL 418.851 places the burden of proof on the claimant to demonstrate his entitlement to compensation and benefits by a preponderance of the evidence. This burden of persuasion never shifts to the employer, although the burden of production of evidence may shift between the parties as the case progresses. Because a claimant does not prove a "disability" under MCL 418.301(4) by merely demonstrating the inability to perform any previous jobs, the burden remains on the claimant to demonstrate that there are no available jobs within his qualifications and training that he can perform. *Only after the claimant has first sustained this statutory burden of proof does the burden of production shift to the employer to show that there are jobs that the claimant can perform.* [*Stokes*, 481 Mich at 284-285 (citations omitted; emphasis added).]

In the present case, the WCAC explained that the opinion of plaintiff's vocational expert, Pasikowski, was flawed because she "lumped all of the plaintiff's restrictions, both work-related and non-work-related, together." However, the WCAC concluded that the testimony of a defense witness, Maruszewski, was adequate to establish plaintiff's case. After summarizing that testimony, the WCAC stated, "The testimony of Ms. Maruszewski leads to one conclusion: the plaintiff's work-related restrictions have caused a diminution in her maximum wage earning capacity in work suitable to her qualifications and training."

Defendants contend that once the WCAC determined that plaintiff's evidence did not establish a prima facie case, it should have ended its analysis and should not have considered defendants' evidence to determine whether a prima facie case of disability existed. Defendants emphasize the statement in *Stokes*, 481 Mich at 285, that "[o]nly after the claimant has first sustained this statutory burden of proof does the burden of production shift to the employer to show that there are jobs that the claimant can perform." Read in isolation, the quoted statement implies a temporal sequence. When read in context, however, the statement is part of the Court's discussion of the burden of persuasion and burden of production. The placement of the employer's burden of production "after" the claimant's burden of proof does not have any bearing on what evidence may be considered in the analysis. This view is consistent with the Supreme Court's direction that the "precise sequence [of the steps] is not rigid . . ." *Stokes*, 481 Mich at 284. If the Court contemplated that only the claimant's proofs could be considered in determining whether the prima facie case was established, then the precise sequence of steps would be important. The Supreme Court also stated, in discussing the importance of discovery, that "[t]he magistrate cannot make a proper determination of whether a claimant has proved a disability without becoming fully informed of all the relevant facts." *Stokes*, 481 Mich at 294. Defendants' position, that the determination of a prima facie case of disability must be based only on the plaintiff's evidence, contravenes the teaching in *Stokes* that a determination of disability should be made on the basis of all the relevant facts. In short, *Stokes* does not support defendants' contention that the WCAC committed legal error in its consideration of evidence presented by the defense to determine that a prima facie case of disability was established.

Within the discussion of this issue, defendants also assert that the WCAC failed to recognize the significance of the testimony of plaintiff's expert that plaintiff was employable. However, the assertion is premised on an inaccurate characterization of the testimony. Pasikowski did not testify that plaintiff was employable with her current restrictions. As stated by the WCAC, "Pasikowski pointed out the obvious: the plaintiff's ability to return to the labor market depends on whether she is released to any employment."

Finally, defendants argue that the WCAC erred by failing to determine whether plaintiff's disability was total or partial, and if the latter, to apply the relevant payment formula. However, the WCAC's review of the magistrate's decision is limited. The WCAC is required to review "only those specific findings of fact or conclusions of law that the parties have requested be reviewed." MCL 418.861a(11). The parties did not raise the issue of partial disability before the WCAC. In *Cane v Michigan Beverage Co*, 240 Mich App 76, 80-81; 610 NW2d 269 (2000), the Court held that where a magistrate's finding of partial disability was not challenged in the appeal to the WCAC, the WCAC exceeded its authority by considering the issue:

We agree with plaintiff that the WCAC exceeded its authority by reviewing the magistrate's determination that plaintiff is now partially disabled as a result of his low-back condition. MCL 418.861a(11); MSA 17.237(861a)(11) provides that "[t]he commission . . . shall review only those specific findings of fact . . . that the parties have requested be reviewed." No party had challenged the magistrate's finding of partial disability on appeal to the WCAC. Rather, plaintiff's appeal challenged the magistrate's conclusion that plaintiff's present low-back disability is not work-related because it was not manifested until after plaintiff's last day of work. Therefore, pursuant to subsection 861a(11), the

WCAC should have limited its review to the magistrate's findings concerning the issue of work-relatedness and causation. The issue whether there was the requisite competent, material, and substantial evidence on the whole record to support the magistrate's finding of a partial disability was not an issue raised for the WCAC's consideration. [*Cane*, 240 Mich App at 80-81.]

Because the parties did not raise the issue of partial disability before the WCAC, the WCAC did not commit legal error by failing to consider that issue.

Affirmed.

/s/ Karen M. Fort Hood

/s/ Mark J. Cavanagh

/s/ Kirsten Frank Kelly